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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1434~~ 193

WASHINGTON METROPOLITAN AREA
TRANSIT COMMISSION,

Petitioner,

v.

D. C. TRANSIT SYSTEM, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Washington Metropolitan Area Transit Commission, petitioner herein, respectfully prays that a writ of certiorari issue to review the final opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this cause on March 7, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals for which review is sought is reported in F.2d , U.S. App. D.C. , and is printed in the Appendix hereto, pp. A-1. The Court of Appeals reversed and set aside an opinion and order of the Washington Metropolitan Area Transit Commission (No. 581, dated March 25, 1966) which is reported in 65 P.U.R.3d 150, and is printed in the Appendix hereto, pp. A-9-26.

Judgment has been entered by the Court of Appeals; that court stayed the transmission of its mandate upon the motion of the Commission pending review by this Court.

JURISDICTION

The opinion of the Court of Appeals sought to be reviewed was dated and entered on March 7, 1967. Jurisdiction is conferred in this Court to review the judgment of the Court of Appeals by 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

I

Whether the Court of Appeals violated basic principles of judicial review in its consideration of the Commission order?

II

Whether the Court of Appeals applied an improper standard in reviewing the Commission's order by going behind the certificates to consider the scope of the carriers' grandfather rights?

III

Whether, even if it was proper review, the Court of Appeals' conclusions as to the scope of the grandfather rights were erroneous?

IV

Whether the Court of Appeals erred by basing its ruling on a factual determination directly contrary to a Commission finding which was supported by substantial evidence?

STATUTES INVOLVED

Washington Metropolitan Area Transit Regulation Compact Act (1960), Public Law 86-794, 74 Stat. 1031, as amended, Public Law 87-767, 76 Stat. 764:

Article XII, Section 4(a) provides:

> No person shall engage in transportation subject to this Act unless there is in force a certificate of public convenience and necessity issued by the Commission authorizing such person to engage in such transportation; provided, however, that if any person was bona fide engaged in transportation subject to this Act on the effective date of this Act, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within 90 days after the effective date of this Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

Article XII, Section 4(e) provides:

> The Commission may, if it finds that the public convenience and necessity so require, require any person subject to this Act to extend any existing service or provide any additional service over additional routes within the Metropolitan District, provided, however, that no certificate shall be issued to operate over the routes of any holder of a certificate until it shall be proved to the satisfaction of the Commission, after hearing, upon reasonable notice, that the service rendered by such certificate holder, over such route, is inadequate to the requirements of the public necessity and convenience; and provided further, if the Commission shall be

of opinion that the service rendered by such certificate holder over such routes is in any respect inadequate to the requirements of the public necessity and convenience, such certificate holder shall be given reasonable time and opportunity to remedy such inadequacy before any certificate shall be granted to operate over such route; and further provided that no person subject to this Act may be required to extend any existing service or provide any additional service over additional routes within the Metropolitan District unless the carrier is currently earning a reasonable return on its operation as a whole in performing transportation subject to this Act.

Article XII, Section 17(a) provides:

Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for the fourth circuit, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty (60) days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and con-

ditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The court may affirm or set aside any such order of the Commission, and state the reasons therefor, and such judgment shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in §§ 239 and 240 of the Judicial Code, as amended (U.S.C. Title 28, §§ 346 and 347).

STATEMENT OF THE CASE

This is an appeal from the opinion of the United States Court of Appeals for the District of Columbia Circuit setting aside an order of the Washington Metropolitan Area Transit Commission. As this is the first case involving the Commission which has been brought to the Supreme Court since the Commission's inception, a brief history of the law creating the Commission is deemed appropriate.

The Washington Metropolitan Area Transit Commission (hereinafter called the Commission) was created under the terms of a transit regulation compact entered into by the states of Maryland and Virginia and by the District of Columbia.

Washington Metropolitan Area Transit Regulation Compact Act (1960), Public Law 86-794, 74 Stat. 1031, as amended, Public Law 87-767, 76 Stat. 764.

Prior to the execution of the compact, authority to regulate mass transit service in the Washington metropolitan area had been divided among Virginia, Maryland, the District of Columbia, and the Interstate Commerce Commission. One of the steps taken by Congress was the authorization of negotiations between the District of Columbia, Maryland, and Virginia of the terms of a Washington metropolitan area

mass transit compact. National Capital Transportation Act of 1960, Title III, § 301, 40 USCA § 671. As the possibility of such a compact had been long under consideration, negotiations proceeded apace, and before the end of 1960 Congress was able to give consent and approval to its terms. Washington Metropolitan Area Transit Regulation Compact Act, Public Law 86-794, 74 Stat. 1031 (1960), amended, Public Law 87-767, 76 Stat. 764 (1962). The Commission officially began operations on March 22, 1961, and, as provided by Article XII, Section 4(a) of the Compact, issued "grandfather" certificates to all of the carriers involved in this proceeding.

Accompanying the National Capital Transportation Act of 1960 was the report of the House Committee on the District of Columbia, US Code Cong. & Adm. News, 86th Cong., 2d Sess., 1960, p. 3212. This report makes it clear that one of the main problems sought to be alleviated by the approval of a mass transit compact was the area's steadily worsening traffic congestion caused by the rapidly increasing use of private automobiles on the highways of the metropolitan area. Further, it is clear that the Compact was enacted so that it would be possible to deal with the problems of mass transportation on an areawide basis and to effect improvements which would not be possible if problems were viewed by each separate jurisdiction on a narrow, parochial basis.

With this background in mind we can turn to the facts of the instant proceeding.

The proceeding involved an attempt by the Commission to effect basic improvements in the mass transportation service available to residents of the metropolitan area. Specifically, the Commission concerned itself with the fact that for many years bus service for riders from certain areas of suburban Maryland and Virginia had terminated in the vicinity of 11th and 12th Streets and Pennsylvania Avenue, northwest. Meanwhile, in the past few years the area surrounding Farragut Square, at Connecticut Avenue and K Street, northwest, had become a major employment center, with a high

concentration of large office buildings. To make mass transportation more attractive, the Commission instituted a proceeding to determine whether some portion of the service from the suburbs should terminate at Farragut Square, rather than at Twelfth Street and Pennsylvania Avenue.

Put in its simplest form, the basic issue before the Commission was the subsequent construction by the Commission of the grandfather certificates it had previously issued to the two suburban bus companies, which provided the service in question.

On March 25, 1966, the Commission issued its Order No. 581, in which it directed the A. B. & W. Transit Company ("A. B. & W.") and the WMA Transit Company ("WMA") to extend their regular route service between Virginia and Maryland, on the one hand, and the District of Columbia on the other, in the District of Columbia.

The issuance of the Order followed extensive hearings. The proceeding was investigative in nature, based on a recommendation of the Commission's Staff, to determine whether (1) the two carriers had the requisite operating authority to render the service, and (2) there was a need for the service to be rendered. The Staff, WMA, and A. B. & W. contended that the certificates of public convenience and necessity of the two carriers did authorize the service. D. C. Transit System, Inc. ("D. C. Transit"), an intervenor in the proceeding, took a contrary view. The Staff and WMA also contended that the extended interstate service was needed. A. B. & W. opposed the proposal solely on the ground that the extended service was economically unfeasible. D. C. Transit objected on the grounds that it would be substantially injured financially, and that the provisions of Section 4 (e) of the Compact had not been followed. It also raised an evidentiary issue, not discussed by the Court in its subsequent opinion.

In its Order, the Commission made numerous findings, including the following which are significant to the issues raised in this Petition:

1. The certificates of public convenience and necessity of A. B. & W. and WMA authorized the interstate transportation of persons in regular route operations between Washington, D. C. and its suburban environs of Virginia and Maryland;

2. The plain language of the certificates placed no terminal restrictions on those carriers in the District of Columbia, and, therefore, the carriers were authorized to operate regular route *interstate* service to and from a terminal in the area of 18th and L Streets;

3. The proposed service would not have a substantial economic effect on D. C. Transit;

4. One of the basic purposes for the creation of this Commission was to provide for the improvement of mass transit and alleviation of traffic congestion without regard to political boundaries, and the decision of the Commission helped to accomplish this basic purpose;

5. The proposed service is not competitive with D. C. Transit's service, the former being interstate in nature and the latter being intrastate in nature, but, even if the service were competitive, the certificates as written do authorize the extended service; and

6. The proposed transportation was in the public interest.

Based on these salient findings, the Commission directed WMA and A. B. & W. to extend their interstate mass transit service in the District of Columbia to a terminal area at 18th and L Streets, N. W.

Transit sought review of the order in the United States Court of Appeals for the District of Columbia Circuit, under the provisions of Section 17(a) of the Compact.

On March 7, 1967, that Court entered its opinion and order, setting aside the Commission order on the grounds (1) that the certificates could not – and do not purport to – authorize the interstate regular route service beyond a terminal at 11th & 12th Streets and Pennsylvania Avenue, N. W., in the District of Columbia; (2) that prior to the Compact, A. B. & W. and WMA had no authority beyond these points;

(3) that section 4(e) was applicable and was not followed; (4) that the extensions were "competitive" with D. C. Transit's service; and (5) that "there is no serious dispute here that the route extensions will have a substantial financial impact upon [D. C.] Transit."

REASONS FOR GRANTING THE WRIT

I

The Decision of the Court of Appeals Is in Conflict With Nelson, Inc. v. United States, 355 U.S. 554 (1958), and Other Applicable Decisions of This Court and of the U. S. Court of Appeals for the Fourth Circuit.

A. The Court of Appeals Went Beyond the Plain Language of the Commission's Certificates of Convenience and Necessity. In So Doing, the Court Violated Basic Principles of Judicial Review.

Normal principles of judicial review dictate that great weight must be given to a Commission's interpretation of its own rulings. *Norwegian Nitrogen Products Co. v. United States,* 288 U.S. 294, 315 (1933). See also *United States v. Atlantic Refining Co.,* 360 U.S. 19, 24 (1959); *United States v. Zucca,* 351 U.S. 91, 96 (1956); *Mintz v. Baldwin,* 289 U.S. 346, 351 (1933); *Fawcus Machine Co. v. United States,* 282 U.S. 375, 378 (1931); *Heath v. Wallace,* 138 U.S. 573, 582 (1891); *Hastings & D. R. Co. v. Whitney,* 132 U.S. 357, 366 (1889); *United States v. Johnston,* 124 U.S. 236, 253 (1888), cases there cited. The requirements in this regard are even more stringent in the case of interpretations of certificates of convenience and necessity. Commission rulings on such certificate can be overturned only if they are arbitrary, capricious or clearly erroneous. *Nelson, Inc. v. United States,* 355 U.S. 554, 558; *Kroblin Refrigerated Express, Inc. v. United States,* D.C. Iowa 1961, 197 F. Supp. 39; *Bind Trucking Co. v. United States,* D.C.Wisc. (1955), 159 F.Supp. 717. This principle has been recognized in cases involving this very Commission before the Court of Appeals for the

Fourth Circuit. "That the Commission is the final interpreter of its own orders is no longer debatable. *Nelson, Inc. v. United States,* 355 U.S. 554, 557-558." *D. C. Transit, System, Inc. v. Washington Metropolitan Area Transit Commission,* 366 F.2d 542 (4th Cir. 1966).

The Court of Appeals neither stated that the Commission's ruling was arbitrary, capricious, or clearly erroneous, nor spelled out any theory why this might be the case. In fact, as will appear *infra,* the Court of Appeals applied an improper standard in reviewing the Commission's order.

The propriety of the Commission's ruling must be tested by the language of the certificates. It is not proper to go behind that language in ruling upon their scope.

Thus, in the *Nelson* case, the Supreme Court considered the I.C.C.'s interpretation of a grandfather certificate which that Commission had issued. The Court began its review of the Commission's ruling by stating:

> In ascertaining that meaning, we are not given *carte blanche;* just as '[t]he precise delineation of an interprise which seeks the protection of the grandfather clause has been reserved for the Commission' . . ., *subsequent construction of the grandfather permit by the Commission is controlling on the courts unless clearly erroneous.* 355 U.S. at 558. (Emphasis supplied)

The Court then dealt with the argument that it should look to the scope of the actual grandfather operation. It said:

> If this be so, the remedy lies elsewhere; in the event the grandfather permit does not correctly reflect the scope of the grandfather operation, the carrier's recourse is to petition the Commission to reopen the grandfather proceedings for consideration of the evidence not previously brought to the Commission's attention. 355 U.S. at 561, 562.

In other words, the language of the certificate as issued was controlling and the Court would not go behind that language in reviewing the Commission's interpretation thereof.

Thus, neither the parties, the Commission, nor the Court had the right in this proceeding to go behind the certificate and question the Commission's right to issue it in the terms used.

Similarly in *Sims Motor Transport Lines, Inc. v. United States,* 183 F. Supp. 133 (N.D. Ill. 1959), a three judge court reviewing an I.C.C. ruling on the scope of a certificate said:

> . . . [I]f plaintiff believes that the scope of his certificate is too restrictive when considered against its background, his remedy is to petition the Commission to reopen the grandfather proceedings. *Nelson v. United States,* supra, at pages 561, 562. This proceeding is concerned only with the interpretation of the certificate as it now exists.

It is apparent that in the present proceedings the Court of Appeals failed to accord the Commission's ruling responsible review under the above-stated standards. Under those standards, the Court should have considered the language of the certificates.

The Commission, in its Order, set forth the pertinent portions of the A. B. & W. and WMA certificates. Order No. 581, p. 6. The WMA certificate, for example, authorizes regular route operations "[b]etween Washington, D. C., and points in Maryland; and between points in Maryland, serving all intermediate points; restricted, however, against the transportation of intrastate passengers in the District of Columbia." At this juncture, nothing on the face of the certificate would act as a limitation on the carriers to render interstate service from Maryland to the extended terminal at 18th and L Streets.

The certificate continued: "Route No. 1 From Washington, D. C. over city streets to Southern Avenue, thence over Business Route 4, . . ." Again, no language of limitation appears on the face of the certificate.

Moreover, the Commission is not alone in its reading of these certificates. The Commission compared the language

of its certificates with the language of the carriers' Interstate Commerce Commission certificates, and *found* that in not designating specific streets within the District of Columbia, "this Commission clearly followed the procedure of the I.C.C." Order No. 581, p. 6. This Commission discussed I.C.C. cases interpreting their certificates, which revealed that ". . . where the streets within a municipality have not been designated by us, and we have authorized operations over city streets, it seems clear that the carrier is authorized to operate over any city street within the municipality . . ." *Hudson Bus Transportation Co., Inc. Passenger Service,* 5 Fed. Car. Cas. 31, 197 (1946). Also, in *A. B. & W. Transit Company Extension of Operation—Washington National Airport,* the I.C.C. held: "Applicant's right to operate over any public highway or street within the municipal limits of Alexandria, subject to all lawful requirements of that city, could not well be questioned by anyone." 30 M.C.C. 618, at page 620.

Based on the language of its own certificates and the concurring interpretation by the I.C.C. of identical language in certificates issued by that Commission, the Transit Commission *found* that it could ". . . only conclude that the certificates held by A. B. & W. and WMA already authorize the proposed service extensions." Order No. 581, p. 8. Nevertheless, the Court of Appeals said that the certificates "do not purport to" authorize the proposed service. Significantly, and we feel improperly, the Court arrived at this conclusion *without any analysis of the language of the certificates.* Therefore, the Commission contends that the Court of Appeals erred in failing to follow the principles of judicial review cited previously, which require that the rights of the carrier be determined by the language of the certificate and, further, that the Commission's interpretation of the language of the certificates be sustained unless it is arbitrary or clearly erroneous. Here, the Commission's reading of the language was not only not arbitrary and capricious, it was the only reading which could possibly be made. The Court over-

turned that interpretation only by ignoring it and looking beyond the plain language of the certificates.

B. The Court's Ruling on the Scope of the Certificate Was Based on Its View of the Actual "Grandfather" Operation. It Was Improper To Consider That Operation in This Proceeding.

We have previously pointed out that the Court did not base its ruling as to the scope of the certificates on the language of those certificates. Rather, the Court resolved the question by an independent determination of the "grandfather" rights of the two carriers. Thus, the Court stated that the grandfather certificates "could cover no more" than transportation to 11th Street and Pennsylvania Avenue.

The Court then went on to state ". . . that A. B. & W. and WMA originally received the authority to traverse certain streets from the District line to the terminal points at 11th and 12th Streets and Pennsylvania Avenue. *Prior to the Compact, they had no authority to extend their operations beyond these points.*" (Emphasis added) We point out to this Court that such a finding could only be made upon a re-opening and *complete* reconsideration of the grandfather application, because there is nothing in the certificates to support such a finding.

The validity of the "grandfather" orders granting the certificates was not directly assailed in the administrative proceeding and was not litigated before the Commission. Hence, it was not reviewable before the Court of Appeals, and it was error for that Court to do so. This is an impermissible attempt to attack the original orders collaterally. If their validity is to be questioned, it can be accomplished only by reopening the proceeding wherein such orders issued. *Nelson, Inc. v. United States, supra,* 355 U.S. 554, 561-562. *D. C. Transit System, Inc. v. Washington Metropolitan Area Transit Commission,* 366 F.2d 542 (1966).

It would have been improper for the Commission, in the instant proceeding, to go behind the certificates and show that the A. B. & W. and WMA operating authorities prior to

the Compact were different than those set out in their certificates, even if it could. In short, this would amount to a collateral attack upon the certificates, which is prohibited. *Callahan Road Improvement Co. v. United States*, 345 U.S. 507 (1953), *rehearing den.*, 345 U.S. 978 (1953). If the Commission is so estopped, the prohibition would extend to the Court of Appeals.

Indeed, the law appears to be that one cannot go behind the certificate for any purpose unless an ambiguity appears, and then only to resolve the ambiguous language. The Court of Appeals has not disclosed an ambiguity in the certificates. In fact, the Court's opinion is devoid of any discussion of the language of the certificates whatsoever. Thus, the review accorded the Commission Order by that court is in direct conflict with applicable principles of law laid down by this Court, and followed by the Court of Appeals for the Fourth Circuit in cases directed in point with this case.

C. Even if It Were Proper To Go Behind the Certificate, the Court's Conclusion as to the Scope of the Grandfather Rights Cannot Be Sustained.

Assuming that, despite the clear rulings to the contrary in *Nelson* and the other cases cited in the preceding sections, the Court of Appeals was justified in going beyond the plain language of the Commission's certificates, that court's action was nonetheless wholly unjustifiable. The Court of Appeals stated that the rights granted in the "grandfather" certificate must have been limited to Twelfth and Pennsylvania Avenue, N. W. since this was the extent of actual – rather than potential – operations prior to issuance of the certificate. It further said that the certificates could grant no more and purported to grant no more. The latter statement is patently inaccurate since, as previously discussed, the certificate certainly purported to grant substantially more than the limited right to operate to Twelfth and Pennsylvania Avenue, N. W. The statement that the Commission *could* grant no more is equally inaccurate.

In its collateral attack upon the Commission's certificates, the Court of Appeals felt that the District of Columbia Public Utilities Commission could and did modify or restrict the interstate operating authority granted by the Interstate Commerce Commission. Apparently mistaking the right of that Commission, operating in conjunction with the District of Columbia Commissioners via a joint board, to control such interstate operations only as to general safety regulations for control of streets, the Court assumes that the carriers "had no authority" to extend their operations beyond the original terminal point, because restricted thereto by the District of Columbia Commission. In fact, orders of that Commission, submitted as evidence, clearly reveal that they were related to "use of streets" regulation rather than a limitation on the carriers' interstate operating authority.

The right of a jurisdiction, such as a city, to promulgate general safety regulations is quite distinct from the power to determine who may engage in interstate commerce and the extent to which such interstate commerce may penetrate into a city. Both the Interstate Commerce Act and the Compact gives the regulatory agency the discretion to determine the extent of such interstate commerce. See this Court's opinion in *Railroad Transfer Service, Inc. v. City of Chicago, et al.*, U.S. (1967), wherein this Court prohibited the City of Chicago from enacting ordinances interfering with interstate commerce.

In granting the broader rights found to exist in Order No. 581, the Commission was clearly within its powers. In Order No. 581, the Commission discussed the terms of the predecessor certificates. The Commission pointed out that those certificates included no restrictions on the rights of the carriers to serve any area of Washington, D. C. Order No. 581, p. 5. The Commission further pointed out that the authorities which had issued those certificates had ruled in various cases that route extensions within the city named in their certificate did not constitute a change in the certificate. Order No. 581. pp. 5-8. Thus, the Commission's discussion of the background of the certificates it issued reveals, *prima*

facie, that the carriers were not limited, under their predecessor certificates, to a terminal at Twelfth and Pennsylvania Avenue, N. W. Having pointed out these facts, the Commission held that the rights granted by its certificate included the right to the route extensions here in question. The Commission's ruling on this point is entitled to great weight and may be overturned only if it is arbitrary and capricious. See cases cited *supra*. The Commission's ruling was supported by a careful consideration of the predecessor certificates and rulings of the authorities which issued those certificates. The Commission's view can hardly be considered an arbitrary or capricious one. Nor is it clearly in error. Yet the Court of Appeals casually cast it aside, without discussion, on the erroneous theory that the actual operations prior to issuance of the certificate are the limiting factor. This was an obvious violation of the principles applicable to judicial review.

D. The Court's Ruling Was Based on a Factual Determination Directly Contrary to a Commission Finding Which Was Supported by Substantial Evidence. This Was a Violation of Basic Principles of Review.

The Court stated that "[t]here is no serious dispute here that the route extension order will have a substantial financial impact upon Transit." This "finding" of the Court is completely contrary to the Commission's determination that "[i]t is the Commission's considered judgment that there will be no substantial economic effect upon D. C. Transit if the proposed transportation is performed." Order No. 581, p. 12.

The test on judicial review is, of course, whether the finding of the Commission is supported by substantial evidence on the record viewed as a whole; if it is, the finding is conclusive. Section 17(a), Article XII, Compact (74 Stat. 1046). It is not for the Court to strike down conclusions that are reasonably drawn from the evidence and findings. Its duty is to determine whether the evidence supporting the Com-

mission's findings is substantial. *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474 (1945). Consideration of the weight and value of the evidence and the inferences to be drawn therefrom are matters for the Commission alone. *New England Divisions case,* 261 U.S. 184, 204; *ICC v. Union Pacific R. R.,* 222 U.S. 541, 547.

The Commission's finding as to the impact on D. C. Transit is clearly supported by substantial evidence. The Commission conducted an extensive survey, described at pp. 8 et seq. of Order No. 581, in an attempt to determine, among other things, the impact of the proposed changes. That survey revealed that 1413 out of 5166 persons who presently ride the bus and who responded to the survey would use the extended service. Not all of those 1413 persons use interline tickets. Yet D. C. Transit's claim of substantial impact was based on the contention of its witness that D. C. Transit would lose all interline ticket sales. The Commission specifically rejected this contention. Order No. 581, p. 12. The contention is, first of all, unacceptable on its face. It presupposes that all interline ticket sales originate in or terminate in the 18th and L Street area. Yet, the D. C. Transit witness said he did not know how many interline passengers originate or terminate in that area. However, a staff witness testified that thousands of riders use an interline ticket between the Pentagon and the District of Columbia, and in his opinion very few of these riders were destined to, or originate from, the 18th and L Streets area. Moreover, the D. C. Transit contention was, in the Commission's view, contradicted by the results of the survey discussed above. The Commission's rejection of D. C. Transit's contention clearly had support in the record.

Additionally, based on the testimony of experts of the large development of the employee population in the 18th and L Area, the Commission found that the extended service would draw car riders to the buses in such large numbers that "a substantial number of automobiles may be eliminated from the downtown area, which will be of direct economic benefit to D. C. Transit." Order No. 581, p. 12. See also

the summary of testimony of witnesses Hansen and Kesler, at page 11 of the Order.

Thus, the substantial evidence rule was completely ignored by the Court. The Court of Appeals made a factual statement directly contrary to a Commission finding and footnoted, in support thereof, a reference to certain testimony which was characterized by the Commission as based on a premise that ". . . is not only contrary to the record, but is invalid on its face." Order No. 581, p. 12. The Commissions's factual determination is clearly supported by evidence which was discussed in Order No. 581. The Court of Appeals did not even trouble to discuss whether the Commission's finding is supported by substantial evidence. It merely pulled from the record testimony rejected by the Commission and used it as the basis for a factual assertion. Such action on review is contrary to the most fundamental principles of administrative law and should be overturned by this Court.

The foregoing discussion highlights the basic error in the Court of Appeals' approach to this proceeding. The Commission, early in its decision, recognized that the initial and critical question revolved around the *existing* authority possessed by A. B. & W. and WMA. If the certificate – as written – authorized the extension, no further grant of certificate of authority was needed. If the certificates as written did not authorize the extended service, but did in fact restrict the interstate operations to the existing terminal, then a public convenience and necessity proceeding would be required, and Transit Commission then, and only then, could and must invoke Sec. 4(e), which statutory provision is applicable only in a public convenience and necessity proceeding.

The Commission looked to the language of the certificates and found that they authorized the extensions. The Court of Appeals ignored the certificates and embarked on a collateral and *de novo* consideration of the grandfather rights of those carriers. In so doing, the Court violated basic principles of judicial review.

II

The Instant Action Is Appropriate for the Invocation of This Court's Consideration, for There Are Special and Important Reasons Therefor.

It would be difficult to conceive of a decision more detrimental to the basic objectives of the Commission's regulatory efforts than the Court of Appeals' denial of the route extensions granted in Order No. 581. The Commission's action effected basic improvements in mass transportation in the metropolitan area. It was designed to, and did, draw very substantial numbers of persons away from use of their automobiles and onto mass transit, thus contributing materially to alleviation of traffic conditions. It improved transit service significantly for a number of persons already using mass transit. Many, many basic personal decisions on such matters as where to live, where to work, and the purchase and sale of automobiles and homes have been made on the basis of the route extension. It is self-evident that abandonment of these extensions will mean hardship and inconvenience to substantial numbers of persons.

Of course, if the Commission was in error on matters of substance or procedure in granting the extensions, the hardships engendered by the Court's decision are a matter of unavoidable necessity at this juncture. However, consideration of the record reveals that the Commission held extensive hearings and fully considered all aspects of its action. The discussion *supra* demonstrates that the Court of Appeals applied the wrong standards on matters of law in its review of the Commission's Order. Perhaps more seriously, it was

based on a factual conclusion directly contrary to a Commission finding fully discussed in the Order and fully supported in the record. This is a matter which richly deserve the attention of this Court. It would be tragic if the public were denied the basic improvements in mass transportation made possibly by the Commission's action merely because the Court of Appeals relied on testimony which the Commission, who heard the witness and evaluated the evidence in the light of other expertise, rejected.

It is submitted that the Court's decision is erroneous for the foregoing reasons, and therefore this petition for certiorari should be granted.

CONCLUSION

WHEREFORE, petitioner prays that certiorari be granted to review the opinion and order below.

Respectfully submitted,

RUSSELL W. CUNNINGHAM
General Counsel
WASHINGTON METROPOLITAN
AREA TRANSIT COMMISSION
1815 North Fort Myer Drive
Arlington, Virginia 22209

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,188

D. C. TRANSIT SYSTEM, INC., PETITIONER

v.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION, RESPONDENT

W.M.A. TRANSIT COMPANY, INTERVENOR.

Petition to Review Orders of the
Washington Metropolitan Area Transit Commission

Decided March 7, 1967

Mr. Harvey M. Spear, with whom *Mr. Manuel J. Davis* was on the brief, for petitioner.

Mr. Russell W. Cunningham for respondent.

Mr. Stanley H. Kamerow, with whom *Mr. Allan L. Kamerow* was on the brief, for intervenor.

Before FAHY, MCGOWAN and TAMM, *Circuit Judges.*

MCGOWAN, *Circuit Judge:* This is an invocation of the power vested in us by Congress to review orders of the Washington Metropolitan Area Transit Commission. This

review authority is but one facet of the Washington Metropolitan Area Transit Regulation Compact, Public Law 86-794, 74 Stat. 1031 (1960), which brought the Commission into being as part of a comprehensive scheme, transcending state lines, for the regulation of mass transit.[1] The orders under review directed two bus companies—Alexandria, Barcroft and Washington Transit Company, Inc. (ABW), and W.M.A. Transit Company (WMA)—to extend their routes from their present terminals at 11th and 12th Streets and Pennsylvania Avenue, N. W., to the vicinity of 18th and L Streets, N. W. The complainant here is D.C. Transit System, Inc. (Transit), which provides bus service within the District of Columbia generally and, in particular, along the route extensions of ABW and WMA ordered by the Commission. WMA has intervened here in support of the Commission's action. We have concluded, for the reasons hereinafter appearing, that that action must be set aside.

I

Transit has pressed upon us a number of respects in which it asserts the Commission has erred. We do not

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[1] The regulatory provisions are contained in a Compact entered into by Virginia, Maryland, and the District of Columbia. The Compact is set forth in a statute wherein Congress has, as required by the Constitution, given its consent to it. Other provisions of the statute, as distinct from the Compact, provide among other things that (1) the powers of the Public Utilities Commission of the District of Columbia with respect to transportation shall be suspended during the life of the Compact, and (2) the rights, duties, and obligations created by the Act of July 24, 1956, Public Law 757, 70 Stat. 598, granting a franchise to D.C. Transit System, Inc., shall not be impaired or affected by anything in the Compact or in the statute consenting to it. The statute consenting to and embodying the Compact is set forth in 1 D.C. Code §§ 1410-16 (1961 ed.).

need to address ourselves to more than the essential premise upon which the Commission proceeded. This was that the grandfather certificates held by ABW and WMA encompassed the routes as extended, and that all that the Commission had to consider, before ordering ABW and WMA to provide the additional service, was whether there was any significant demand for it. As the Commission put the matter in its order under review, if what it termed the "crucial issue" of the scope of the grandfather certificates be decided in favor of an expansive reading of them, then the "secondary issue" of the public interest "can largely be determined by an inquiry into the demand for the proposed service." Thus it was that upon evidence designed to show that ABW and WMA riders would be convenienced by the route extensions and would make use of them, and without reference to the adequacy of the existing service being provided by Transit or the impact upon Transit and its riders of the resulting loss of revenue, the Commission commanded the enlarged service to be supplied. In so deciding, the Commission, in our view, unacceptably departed from the authority conferred upon it by the Compact.

When Congress consented to the Compact in 1960, it elected to treat the metropolitan area of Washington as a geographical unit, with the Commission as the central licensing and rate-making authority. No one could engage in the transportation covered by the Compact except upon its terms; and these included the issuance by the Commission of a certificate of public convenience and necessity. Recognizing the equities underlying the familiar "grandfather" approach, the Compact expressly contemplated the issuance of certificates, without new or further proof of public convenience and necessity, to those "bona fide engaged in transportation" on the effective date of the statute. ABW and WMA sought and were given such grandfather certificates. They were not put to any proof

of public convenience and necessity. The transportation they were providing on the effective date of the Compact extended from various points in Virginia and Maryland, respectively, to their terminals at 11th and 12th Streets and Pennsylvania Avenue, N. W., in the District. Their grandfather certificates, by statutory definition, could cover no more, and, as issued, they do not purport to.[2]

II

The Commission may, like most regulatory bodies, require existing certificate holders to extend their services beyond those previously authorized. This power is reposed in Section 4(e) of the Compact, the full text of which is set forth in the margin.[3] It will be observed that, in

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[2] It is familiar law that the grandfather principle in public utility licensing is founded upon actual—and not potential—operations. United States v. Carolina Freight Carriers Corp., 315 U.S. 475 (1942). And see Holiday Tours, Inc. v. WMATC, 122 U.S.App.D.C. 196, 352 F.2d 672 (1965), and Gadd v. WMATC, 121 U.S.App.D.C. 7, 347 F.2d 791 (1965). There is no reason to suppose that Congress read the Compact language of "bona fide engaged in transportation . . . on the effective date of this Act" in any manner contrary to this principle. See also Nashua Motor Express, Inc. v. United States, 230 F. Supp. 646 (D.N.H. 1964).

[3] "The Commission may, if it finds that the public convenience and necessity so require, require any person subject to this Act to extend any existing service or provide any additional service over additional routes within the Metropolitan District; provided, however, that no certificate shall be issued to operate over the routes of any holder of a certificate until it shall be proved to the satisfaction of the Commission, after hearing, upon reasonable notice, that the service rendered by such certificate holder, over such route, is inadequate to the requirements of the public necessity and convenience; and provided, further, if the Commission shall be of opinion that the service rendered by such certificate holder over such route is in any respect inadequate to

addition to a general finding of public convenience and necessity as a condition of such extension, there are precise limiting provisos applicable to those cases where the service extension is over the routes of another certificate holder. These are (1) that the latter's service is found to be inadequate, and (2) that, if so found, he be given a chance to remedy it. The Commission made no such finding in respect of Transit in this case.[4]

Before the advent of the Compact, a carrier coming into the District of Columbia from Maryland or Virginia needed certificate authority for this interstate service from the Interstate Commerce Commission. It was the practice of that agency to specify only the District of Columbia as the terminus of the service, leaving it to local regulatory authority to control the street routings and termini within the District. This latter authority for years was exercised by a Joint Board made up of the Public Utilities Commission of the District and the District

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the requirements of the public necessity and convenience, such certificate holder shall be given reasonable time and opportunity to remedy such inadequacy before any certificate shall be granted to operate over such route; and further provided that no person subject to this Act may be required to extend any existing service or provide any additional service over additional routes within the Metropolitan District unless the carrier is currently earning a reasonable return on its operation as a whole in performing transportation subject to this Act."

[4] Transit intervened in the proceedings instituted by the Commission looking toward an extension of the services of ABW and WMA; and it participated in the hearing. As the Commission's decisional order notes, Transit urged in opposition that it would lose "a great amount of traffic which it now handles via a transfer arrangement," and that new certificate authority could not, under Section 4(e), be given ABW and WMA without a finding as to inadequacy of Transit's service and the affording of an opportunity to Transit to repair any inadequacy found.

Commissioners. It was from this source that ABW and WMA originally received the authority to traverse certain streets from the District line to the terminal points at 11th and 12th Streets and Pennsylvania Avenue. Prior to the Compact, they had no authority to extend their operations beyond these points.

The Commission now appears to assume that, since it has in effect succeeded to the authority of both the Interstate Commerce Commission and the Joint Board of the District of Columbia, it may treat ABW and WMA as being already clothed with certificate authority to go anywhere in the District that the Commission thinks desirable. On this theory, the protections of Section 4(e) of the Compact for existing certificate holders are not applicable, and the Commission need not regard route extensions of the kind here ordered as new and competitive grants of certificate authority. We think this assumption is clearly at odds with the Congressional purposes to be discerned from the Compact and the statute approving it.[5] What

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[5] As remarked above, Note 1, Congress was careful to make clear that no rights of Transit under its franchise were to be impaired by the Compact. Section 3 of the franchise statute is as follows:

> No competitive street railway or bus line, that is, bus or railway line for the transportation of passengers of the character which runs over a given route on a fixed schedule, shall be established to operate in the District of Columbia without the prior issuance of a certificate by the Public Utilities Commission of the District of Columbia (referred to in this part as the "Commission") to the effect that the competitive line is necessary for the convenience of the public.

We need not decide whether this adds anything to the more specific protections contained in Section 4(e) of the Compact, but it emphasizes a Congressional concern that Transit was to be protected against competition except as such competition was found to be necessary to the public

the Joint Board or the Public Utilities Commission of the District of Columbia might have done before the 1956 franchise statute and the 1960 Compact are not the measure of the Commission's authority now.

Transit has been given no exclusive and permanent monopoly. The Commission can, with due observance of the requirements of the statute and upon proper findings, grant certificate authority competitive with that held by Transit. What the Commission cannot do is to extend the routes in the District of ABW and WMA in a manner competitively adverse to Transit without taking into account the limiting conditions contained in Section 4(e), and that involves a concept of the public convenience and necessity which goes far beyond that of the riders of ABW and WMA alone.

There is no serious dispute here that the route extensions ordered will have a substantial financial impact upon Transit.[6] The Virginia resident who formerly had to continue his journey from 12th and Pennsylvania to 18th and L on Transit now can complete that journey on ABW without the need of using Transit. This may be a fine thing for him, but his convenience is not, under the regulatory scheme, the sole criterion. Transit has rights and responsibilities under that scheme as well. Its ability

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convenience. The latter concept would seem to embrace a broader view of the public interest than the Commission thought was involved in this case.

[6] There was testimony by Transit that it would lose 17½¢ from the joint-fare arrangement previously in effect for each passenger from Virginia or Maryland who desired to continue by bus to the 18th and L Streets area. This was estimated as entailing a revenue loss of from $130,000 to $600,000 per year. The Commission's Staff witness, although not accepting the accuracy of these estimates, did not regard the differences as important because he would recommend the route extension in any event.

to provide good transportation service to the residents of the District of Columbia at reasonable rates is intimately related to the degree of utilization of its service. In transportation, as elsewhere, volume critically affects capacity to provide the best service at the lowest rates. To take away a part of Transit's volume by putting new competition on its routes may conceivably have a significantly adverse impact upon those bus riders in the District who must look to Transit for intra-District service.

We do not say that the Commission could under no circumstances do what it has done. What we do say is that such action must be taken in conformity with the statutory requirements and by reference to the statutory standards. That was clearly not done here; and accordingly, the route extensions for ABW and WMA ordered by the Commission must be set aside.

It is so ordered.

BEFORE THE
WASHINGTON METROPOLITAN AREA
TRANSIT COMMISSION
WASHINGTON, D. C.
ORDER NO. 581

IN THE MATTER OF:

Order Instituting Investigation to Determine Whether WMA Transit Company and Alexandria, Barcroft, and Washington Transit Company, Should Extend Bus Routes in Washington, D. C.

Served
March 25, 1966

Docket No. 91

APPEARANCES:

STANLEY H. KAMEROW, 1025 Vermont Avenue, N. W., Washington, D. C., appearing on behalf of WMA Transit Company, Respondent.

S. HARRISON KAHN, and *ROBERT T. MITCHELL, JR.,* 733 Investment Building, Washington, D. C., appearing on behalf of Alexandria, Barcroft and Washington Transit Company, Respondent.

MANUEL J. DAVIS, 1629 K Street, N. W., Washington, D. C., appearing on behalf of Washington, Virginia and Maryland Coach Company, Inc., Intervenor.

JOHN R. SIMS, JR. and *HARVEY M. SPEAR,* 3600 M Street, N. W., Washington, D. C., appearing on behalf of D. C. Transit System, Inc., Intervenor.

RUSSELL W. CUNNINGHAM, 1815 North Fort Myer Drive, Arlington, Virginia, appearing on behalf of the Washington Metropolitan Area Transit Commission.

This matter came before the Commission upon the recommendations of the Engineering staff to require A. B. & W. Transit Company ("A. B. & W."), and WMA Transit Company

("WMA"), to extend their routes to an area in the vicinity of 18th and L Streets, N.W., Washington, D. C. At the present time the service of these carriers generally terminates in the vicinity of 11th and 12th Streets and Pennsylvania Avenue, N.W., Washington, D. C. Under the staff proposal, A. B. & W. and WMA would establish additional terminal points in the vicinity of 18th and L Streets, N.W.

By Order No. 482, served May 25, 1965, the Commission ordered that an investigation be made and hearing held concerning the propriety and reasonableness of the staff's recommendations discussed above.

A. B. & W. and WMA were made respondents and D. C. Transit System, Inc., ("D.C. Transit" or "Transit"), and Washington, Virginia and Maryland Coach Company, Inc. ("W. V. & M."), were permitted to intervene in the proceeding. Public hearings were held on June 22, August 10, 11, 13 and 17, 1965. In addition to the voluminous oral testimony, some one hundred eighty-six (186) exhibits were offered into evidence, of which four (4) were not received. The Commission also had the benefit of briefs.

Prior to and during the course of this proceeding, several motions were filed, including a motion to terminate the proceeding, a motion for proposed report and a motion for oral arguments, the latter of which was filed subsequent to the filing of briefs. The examiner properly denied some of these motions, and those motions which were not denied are hereby denied. The Commission is of the opinion that the evidence adduced at the hearings and briefs of counsel are more than adequate to enable the Commission to reach a fair and equitable decision in this matter, and that oral arguments would not contribute materially to the decision-making process.

The staff presented the testimony of Mr. Charles W. Overhouse, the Commission's Chief Engineer; Mr. Paul W. Foreman, Defense Coordinator for the General Services Administration; Mr. William D. Heath, Executive Director, Motor Vehicle Parking Agency of the District of Columbia; Mr.

Daniel J. Hansen, Deputy Director of Traffic Engineering and Operations for the D. C. Department of Highways and Traffic; and Mr. Edwin L. Kesler, a resident of North Springfield, Virginia.

Respondent, A. B. & W., presented the testimony of Mr. Richard F. Lawson, its Operations Manager, and Mr. George R. Snyder, a Certified Public Accountant employed by A.B.&W. A.B.&W., while admitting it held appropriate authority to serve the area proposed by the staff, opposed the proposed route extensions on the ground that the proposed service would be uneconomical, contending that the proposed service would result in additional expenses without an attendant increase in revenues.

Intervenor, D. C. Transit, presented the testimony of Mr. William E. Bell, its Assistant Vice President, Research and Development; Mr. Gordon Phillips, its Associate General Counsel; Mr. John R. Sims, Jr., its Associate General Counsel; and Mr. Parker C. Peterman, its Vice President and Comptroller. D. C. Transit opposed the proposed route extensions on two grounds, namely: (1) that the proposed service would lure away from it a great amount of traffic it now handles via a transfer arrangement and (2) that the respondent-carriers' certificates do not authorize the proposed transportation, and, because of this fact, are not entitled to such authority until the Commission finds that the existing service is inadequate and D. C. Transit is given the opportunity to correct any deficiencies found to exist in the present service.

Intervenor, W. V. & M., presented the testimony of Mr. S. A. DeStefano, its President, in opposition to the proposed route extension.

Respondent, WMA, presented rebuttal testimony of its Controller, Mr. Samuel A. Sardinia. WMA agreed with the staff's position that it holds appropriate authority from the Commission to operate the proposed service, and is willing to institute the proposed service if ordered by the Commission.

The staff recommended that the Commission require A.B.&W. and WMA to extend their present service to the vicinity of 18th and L Streets, N.W., by route authorizations since in the staff's view, the certificates of public convenience and necessity of both carriers already authorize such operations.

There are two basic issues involved in this proceeding. The crucial issue is whether or not A. B. & W. and WMA presently have the authority by virtue of their existing certificates of public convenience and necessity to perform the proposed transportation. If the present certificates of these carriers authorize such transportation, D. C. Transit and W.V.&M. cannot be heard to complain; the Commission will be merely requiring A. B. & W. and WMA to do what they are by law required to do under their existing certificates of public convenience and necessity. If A. B. & W. and WMA already hold appropriate authority to perform the proposed transportation, the secondary issue becomes one of determining whether or not it would be in the public interest to require such transportation. The public interest question can be largely determined by an inquiry into the demand for the proposed service.

The answer to the crucial question as to whether or not the certificates of A. B. & W. and WMA authorize the subject transportation appears to lie in the certificates themselves. Before looking to the actual language of the certificates, however, it is necessary to consider the circumstances surrounding their issuance. Both certificates were granted pursuant to the "grandfather" provisions of the Washington Metropolitan Area Transit Regulation Compact ("Compact"). In the case of WMA, it had, before the creation of the Commission, operated within Prince Georges County, Maryland, under authority granted to it by the Maryland Public Service Commission; within the District of Columbia, by virtue of the authority granted by the District of Columbia Public Utilities Commission[1] ("PUC"); and in interstate commerce be-

[1] Now the District of Columbia Public Service Commission.

tween points in Maryland and points in the District of Columbia, under certificates of public convenience and necessity granted by the Interstate Commerce Commission ("ICC"). In this latter franchise, as was its custom, the ICC[2] specified the terminal service (i.e., between Maryland points, Washington, D. C.), and specified the routes in Maryland over which the service was to be operated, to the District of Columbia line. Treating the District of Columbia as a city, the ICC did not specify the street routings or terminal locations. All of these pre-compact authorities, plus exempt operations, formed the basis for the WMA "grandfather" claim, and the resulting certificate issued by this Commission combined all of them into one document.

In the case of A. B. & W., the above described background is applicable, except that its operations are between Washington, D. C., and the Northern Virginia area, comprising Alexandria and parts of Arlington and Fairfax Counties. Its ICC authority, similarly, provided for regular-route, common carrier service between Washington, D. C., and points in Virginia.[3] The "grandfather" certificate issued by the Commission encompassed all of A. B. & W.'s prior authority.

D. C. Transit was a similar recipient of a "grandfather" certificate, which was based on pre-compact authority, namely a franchise from the Congress to operate a mass transportation system within the District of Columbia and between points within the Metropolitan area, subject "to the rights to render service within the Washington Metropolitan Area possessed, at the time[4] this section takes effect, by other common carriers of passengers . . ,"[5] and certificates and permits issued by the ICC and the Maryland Public Service

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[2] Exhibit 84, I.C.C. Certificate of Public Convenience and Necessity, No. M.C. 3677, dated February 24, 1954.

[3] Exhibit 83, I.C.C. Certificate of Public Convenience and Necessity, No. M.C. 1800, dated August 7, 1951.

[4] July 24, 1956.

[5] D. C. Transit Franchise, Title I, Part 1, Section 1, P.L. 757.

Commission. It is readily discernible that the respondents' authority antecedes Transit's franchise by several years,[6] and the authority granted by said franchise was subject to the rights contained in the certificates.

The ICC certificates do not include any restrictions on the rights of the respondent carriers to serve any area of Washington, D. C. in interstate transportation. They were, therefore, authorized to transport passengers in interstate transportation to any point in the District of Columbia, subject to local traffic and routing regulations imposed by the District of Columbia. The District of Columbia, through a Joint Board, composed of the PUC and the Commissioners of the District of Columbia,[7] had entered many directive orders of this nature, some of which are exhibits in this proceeding. These routing orders served the same function as this Commission's route authorization. See, for example, Exhibit 86, which is a compilation of orders[8] of the PUC dealing with re-routing, institution of new terminals, and establishment of fringe parking lots. It should be noted that apparently the PUC recognized that the carrier had the necessary certificate operating rights, as there is no mention of certificates of public convenience and necessity - the only criterion being the "public interest."

In 1955, the PUC had a proceeding before it in which similar issues were involved. WMA had requested an extension of a route within the District of Columbia. Transit's predecessor Capital Transit, appeared in opposition, alleging that the change of route would make it competitive with Capital Transit's service, and that under the terms of Section

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[6] The certificates referred to herein are revised. The respondents have been so engaged in interstate operations for many years preceding the dates on the revised certificates.

[7] D. C. Code 40-603(e), 1961 Ed.

[8] Including: D. C. Public Utilities Commission Order No. 2377, dated September 9, 1942; Order No. 4224, dated October 7, 1955.

4 of the Merger Act (Section 44-201, D.C. Code, 1951), the PUC could not permit the extension in route without a finding that public convenience required the extension. The PUC held that a certificate of public convenience and necessity was not required under Section 4 of the Merger Act.[9] The language of that section is almost identical with that in the Franchise.

As previously discussed, the pre-compact operating rights of these carriers were consolidated under a "grandfather" claim, and appropriate certificates were issued by this Commission. The A. B. & W. Certificate (No. 11), provides, in part, as follows:[10]

REGULAR ROUTE

Passengers and their baggage . . . over regular routes.

Between Washington, D. C., and Virginia, between Washington, D. C., Maryland and Virginia, serving all intermediate points; restricted however unless otherwise specifically provided, against the transportation of intrastate passengers in Virginia, Maryland, and the District of Columbia, as follows:

No. 1 From Fort Belvoir, Virginia, over U.S. Highway No. 1, to junction Virginia Highway No. 617, thence over Virginia Highway No. 617 to junction Virginia Highway No. 350 (Shirley Memorial Highway), thence over Virginia Highway 350 to Washington, D. C., and return over the same route.

The WMA Certificate (No. 8) provides, in part, as follows:[11]

REGULAR ROUTE

Passengers and their baggage, and express, in the same vehicle with passengers.

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[9] Exhibit 87, Public Utilities Commission Order No. 4158, dated January 28, 1955.

[10] Exhibit No. 2.

[11] Exhibit No. 3.

Between Washington, D. C., and points in Maryland; and between points in Maryland, serving all intermediate points; restricted, however, against the transportation of intrastate passengers in the District of Columbia.

No. 1 From Washington, D. C. over city streets to Southern Avenue, thence over Business Maryland Route 4, 56th Avenue, Maryland Routes 214, 389, 704, Greenleaf Road, 82nd Avenue, Barlowe Road, Maryland Route 202, Prince Georges Avenue, Hawthorne Street, 73rd Avenue, Forest Road, 74th Avenue to Kent Village, and return over the same route.

In not designating specific streets within the District of Columbia, this Commission clearly followed the procedure of the ICC. Years ago, the ICC adequately answered the charge similar to that raised by Transit herein. In refuting a claim that city streets must be designated, the ICC said:

> To the contrary, in authorizing operation over a route traversed within municipalities or with the routes between adjoining municipalities, it has not been our general policy to specify or designate the streets over which operations may be conducted except in some few instances. In such instances, however, the streets have been specified or named in the authority granted and a carrier holding such authority of course may not operate within the municipalities authorized over streets other than those specified. For an example of where we have specified certain streets in the issuance of a certificate, see *Lincoln Tunnel Applications*, 12 M.C.C. 184. But where the streets within a municipality have not been designated by us, and we have authorized operations over city streets, it seems clear that the carrier is authorized to operate over any city street within the municipality or between adjoining municipalities, and a review of the cases involving this question confirms this. . . .
>
> Moreover, it is to be noted that in authorizing the transportation of passengers between Manhattan and points in the so-called short haul, mass transportation area, city streets are not designated within Manhattan.

> If a carrier's certificate does not specify the city streets over which it may conduct operations, it seems obvious that it may conduct such operations over any city street, otherwise it is doubtful whether changes in operations within Manhattan could be made subject only to the approval of the police department of the City of New York as is now true, in view of the certificate provisions of the Act. *Hudson Bus Transportation Co., Inc., Passenger Service,* 5 Fed. Car. Case 31, 197 (1946).

In another proceeding before the ICC, A. B. & W. had requested authority to serve the Washington National Airport. At that time it held a certificate authorizing regular route operations between Washington, D. C. and Mt. Vernon, Virginia, serving all intermediate points. The ICC pointed out that A. B. & W.'s existing authority accorded it the right to serve said airport. The ICC then said:

> Such operations would be no different, insofar as regulation under the act is concerned, from operations by applicant over the highways and streets of Alexandria, another intermediate point on the same route. Applicant's right to operate over *any* public highway or street within the municipal limits of Alexandria, subject to all lawful requirements of that city, could not well be questioned by anyone. *A. B. & W. Transit Company, Extension of Operation – Washington National Airport,* 30 M.C.C. 618, at Page 620.

The Commission can only conclude that the certificates held by A. B. & W. and WMA already authorize the proposed service extensions, and these carriers may be required to provide the proposed service, through route authorizations, under the terms of their certificates.

The Commission will now discuss the issue of whether or not it would be in the public interest to require A. B. & W. and WMA to extend their routes as proposed pursuant to their certificates of public convenience and necessity.

The primary basis for the Engineering staff's recommendation that the present service of A. B. & W. and WMA be extended to the vicinity of 18th and L Streets, N.W., was

an extensive origin-destination survey of the present patrons of these two companies. The Commission's Chief Engineer testified at length concerning this survey. The record shows that in February of 1965, A. B. & W. and WMA were contacted by the Commission in an effort to seek their cooperation in conducting the aforementioned survey. The Companies agreed to bear all expenses incurred in connection with the survey. On March 22, 1965, during the morning peak period, between approximately 6:00 A.M. and 9:30 A.M., postal card questionnaires were distributed to all A. B. & W. and WMA patrons traveling inbound to points in Washington, D. C. The postal cards could be returned to the driver or dropped in the mail, postage free.

A total of 22,000 cards were printed; 16,000 for A. B. & W. and 6,000 for WMA. Approximately 11,000 cards were distributed by A. B. & W. and 1,500 by WMA. According to the testimony of Mr. Overhouse, excellent results were obtained from the survey. Mr. Overhouse stated as follows:

> Of the cards distributed, approximately 6,000 were returned. Some of these could not be used because they were illegible, ambiguous, blank, etc.
>
> A total of 5,166 cards were usable; 4,366 from the patrons of A. B. & W. and 830 from the patrons of WMA. The destinations expressed on the cards were analyzed, and it was the Engineering Department's view that a patron who could ride a bus to within three blocks of his ultimate destination without transferring was being served conveniently and adequately. Conversely, it was considered that if a through route would not take him within three blocks (approximately ¼mile) of his "downtown destination," his service was inconvenient and inadequate.
>
> Using the above as a guide, it was noted that approximately 41% of present patrons were not being served satisfactorily because their destinations were farther into the northwest section of the city than the present terminals of their companies would permit them to ride. Analysis of the total sample disclosed the following:

A. B. & W. TRANSIT COMPANY

	PSGRS	%
Total Usable Sample	4336	100.0
Presently Served Adequately	2645	61.0
Additional That Would Be Served by Route to 18th & L, N.W.	1110	25.6
Remainder Served Inadequately	581	13.4

WMA TRANSIT COMPANY

Total Usable Sample	830	100.0
Presently Served Adequately	394	47.5
Additional That Would Be Served By Route to 18th & L, N.W.	303	37.0
Remainder Served Inadequately	133	15.5

Based on the survey, the Engineering Department has concluded that at present, 39% or 1,691 A. B. & W. passengers who ride on a normal weekday during the A.M. commute period, and who responded to the survey, are not being adequately served at their destinations in Washington, D. C., and that this number could be reduced to 13.4% or 581 passengers, by extension of that Company's routes to 18th & L Streets, N.W. Likewise, 52.5% or 436 patrons in the WMA sample are not being served adequately, and that an extension of that Company's routes to 18th & L Streets, N.W., would reduce the number to 15.5% or 133 passengers.

Other smaller concentrated areas of inadequate service were also pointed up by the survey, but we found that extensions into the largest of these areas would only adequately serve a minimal percentage of present riders. In each case, extension of service into these smaller areas only produced additional satisfactory service to less than 5% of either Company's patrons.

It was felt that the major service-problem area was to the northwest of the present terminals of A. B. & W.

and WMA, and that the round-trip extensions of 2.15 miles of A. B. & W. lines, and 2.80 miles of WMA lines would serve, at the absolute minimum, an additional 1,400 of these Companies' present daily peak commute period passengers at a satisfactory level.

The thrust of Mr. Overhouse's testimony was that the patrons of A. B. & W. and WMA are not being adequately served under the present scheme of operations. According to the results of the survey, up to 25% of A. B. & W.'s patrons whose destinations are Washington, D. C., would be directly benefitted by route extensions of A. B. & W. into the vicinity of 18th and L Streets, N.W.; up to 37% of WMA's patrons would be benefitted.

The testimony of the other witnesses testifying on behalf of the staff, including Mr. Foreman, Mr. Heath, Mr. Hansen, and Mr. Kesler, corroborates and substantiates the results of the survey, that the 12th Street and Pennsylvania Avenue Terminal of A. B. & W. and the 11th Street and Pennsylvania Avenue Terminal of WMA no longer adequately serve the needs of a substantial number of the patrons of these carriers since their present destinations are in the vicinity of 18th and L Streets, N. W.

Mr. Paul Foreman, Defense Coordinator for the General Services Administration, is uniquely qualified to recommend solutions to transportation problems as they relate to Federal employees in the Nation's Capital. Mr. Foreman testified that since 1962 there has been a tremendous increase in the number of federal employees located in the mid-town, 18th and L Streets area. He concluded that the proposed extension was needed, and in addition to benefitting existing riders, would attract those now using other modes of transportation.

Mr. William D. Heath, Executive Director, District of Columbia Motor Vehicle Parking Agency, testified in relation to further growth of the downtown area. Mr. Heath stated that in 1955 the employee population in the area of 18th and L Streets, N.W., was approximately 26,000. By 1965, the employee population in this area had increased to ap-

proximately 45,000, or an increase of about 70%. When buildings under construction are completed and occupied they will have approximately 56,000 employees or a gain of over 100% since 1955.

Mr. Daniel J. Hansen, Deputy Director of Traffic Engineering Operations, D. C. Department of Highways and Traffic, testified that his department had reviewed the staff proposal and had conducted a number of field studies relative thereto. These included personal interviews, pedestrian counts and traffic studies. Mr. Hansen concluded that the proposed extension of bus service would encourage people to use public transportation and thereby reduce the number of private passenger cars that enter the District of Columbia daily, solely for the purpose of bringing commuters to work in the morning and returning them home in the evening.

Mr. Edwin L. Kesler, a public witness who appeared at the hearing voluntarily, testified that his wife formerly worked in the area to be served by the proposed extension. Her travel pattern was from home to 18th and Constitution Avenue, thence by foot to 18th and M Streets, N.W.; transfer to Transit was too time consuming, which prompted her to walk. Mr. Kesler corroborated Mr. Hansen's testimony and stated that in foul weather he would drive his wife to work; because her quitting time varied from day to day, he frequently had to circle the block several times. It was Mr. Kesler's opinion that the existing service is also unsatisfactory to persons similarly situated.

As previously noted, both A. B. & W. and WMA agree that their present certificates authorize the proposed route extensions. WMA is not only willing to render the proposed service, but tendered a definite scheme of operations which it felt would be profitable. In addition to providing better service for existing patrons, it was stated that additional patrons would be attracted. The thrust of A. B. & W.' opposition is directed toward the economic feasibility of the proposed transportation. A. B. & W.'s objection is easily overcome by pointing out that at any time when the demand

for the service no longer justifies the cost involved, appropriate adjustments in service will be made commensurate with the demand, and such action will be taken administratively consistent with the present practice.

The Commission can give little weight to W. V. & M.'s objection to the proposed route extensions. W. V. & M. and A. B. & W. operate primarily between adjacent areas in Northern Virginia and the District of Columbia. Since A. B. & W. serves an area comprised of Alexandria and the eastern portions of Arlington and Fairfax Counties, and W. V. & M. serves an area to the north and west of the A. B. & W. area, there is only minimal competition between the two carriers where their areas meet. Any siphoning of traffic by the proposed service from W. V. & M. operations would be de minimis. W. V. & M. already serves the present terminal area in Washington, D. C., served by WMA and A. B. & W., and in addition, serves the 18th and L Streets area.

The Commission has carefully considered the evidence adduced by D. C. Transit in this proceeding. The testimony of D. C. Transit to the effect that it stands to lose gross revenues in excess of $600,000 annually, if the staff's recommendations are effectuated, was predicated on the premise that every person now taking advantage of the joint-fare arrangement between respondents and D. C. Transit would no longer use the service of D. C. Transit. Such a supposition is not only contrary to the record, but is invalid on its face. The survey conducted by the staff—which was the only real evidence of probative value on the issue—did not provide any basis for such a premise. D. C. Transit's contention that the proposed route extensions will have an adverse economic effect on its present operations must be related to the conveniences which will result to the traveling public if the service is extended. In viewing the economic impact the proposed route extensions may have upon D. C. Transit, the Commission cannot overlook the possibility, and in fact, the probability, that the improved service might very well generate additional bus patronage to such an extent that there will be no substantial adverse effects on D. C. Transit.

In providing a direct service for bus patrons from points in Virginia and Maryland, discussed herein, a substantial number of automobiles may be eliminated from the downtown area, which will be of direct economic benefit to D. C. Transit. It is the Commission's considered judgment that there will be no substantial economic effect upon D. C. Transit if the proposed transportation is performed.

One of the basic purposes for the creation of this Commission was to provide for the regulation and improvement of mass transit and the alleviation of traffic congestion in the Washington area without regard to political boundaries. If the maximum results are to be obtained, it is most essential that the maximum benefits be derived from the flexibility inherent in our all-bus system. All of the carrier-parties to this proceeding have been articulate exponents of the flexibility inherent in a bus system. The staff proposal is a vivid demonstration of this principal.

Greater use of public transportation is one of the important keys to the alleviation of traffic congestion on the downtown city streets. This record is very clear that a substantial number of daily commuters will be greatly convenienced if the proposed route extensions are effectuated, since a large segment of the public will have the benefit of a single ride in a single vehicle from origin to destination. If the four major transit operators are to continue to meet their public service responsibility and provide the standard of service required, situations involving minimal overlapping of service and minimal competition among the carriers cannot be avoided. If adequate and convenient methods of operations and arrangements among the carriers which are needed in order to meet the demands for public transportation cannot be accomplished voluntarily, then the Commission has no other course in the performance of its responsibilities under the law but to take the necessary action to compel such operations and arrangements. With reference to the case at hand, the Commission does not feel that it is doing any violence to the operations of any carrier involved; to the contrary,

the action taken will represent a major transit improvement for numerous daily bus riders. The service to be extended by A. B. & W. and WMA is largely[12] ~~interstate~~ in scope. D. C. Transit does not operate *interstate*, nor does its certificate authorize *interstate* operations, between the District of Columbia and those portions of Maryland and Virginia affected by the extension proposal.

The holding by the Commission to the effect that the existing certificates of A. B. & W. and WMA authorize the proposed route extensions removes the major objections of all parties to the proceeding. Obviously, under the ruling of the Commission, D. C. Transit is not entitled to an opportunity to improve its service under Section 4(e) or Section 4(g), Article XII, Title II of the Compact, since no certificates of public convenience and necessity are being issued. D. C. Transit's contention that the new service, if authorized, will be competitive with its service, is without merit.[13] But, even if it were construed to be competitive, it is nevertheless authorized by certificates of public convenience and necessity, issued pursuant to the provisions of the Compact and with full knowledge and consent of all parties to this proceeding.

The Commission finds and concludes that the public interest will be served if A. B. & W. and WMA are required to extend their routes so as to provide bus service to the 18th and L Streets area of Washington, D. C.

The Commission will issue herewith appropriate route authorizations directing A. B. & W. and WMA to extend their present service to include the vicinity of 18th and L

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[12] The certificate of WMA authorizes limited intra-District of Columbia service and those persons using such service will be benefitted by the route extensions.

[13] The President of W. V. & M., a subsidiary of D. C. Transit, freely admitted that its service between Northern Virginia and the District of Columbia via the 18th and L Streets area, while being parallel to the service of D. C. Transit, is not a competitive service.

Streets, N.W., in substantial compliance with the recommendations of the Commission's Engineering staff.

THEREFORE, IT IS ORDERED:

1. That A. B. & W. Transit Company and WMA Transit Company be, and they are hereby, authorized and directed to extend their service to the vicinity of 18th and L Streets, N.W., Washington, D. C.

2. That A. B. & W. Transit Company and WMA Transit Company be, and they are hereby, required to extend their service referred to in paragraph 1 above, in accordance with route authorizations issued in compliance with the established procedures of the Commission and attached hereto.

3. That the service authorized and directed to be operated herein be instituted forthwith, but in no event later than sixty (60) days from the date of this Order.

BY DIRECTION OF THE COMMISSION:

DELMER ISON
Executive Director

WASHINGTON METROPOLITAN AREA
TRANSIT COMMISSION

Route Authorization No. 1 – 66

IN THE MATTER OF: March 25, 1966

Establishment of Bus Routes for Alexandria, Barcroft and Washington Transit Company in Washington, D. C.

By Order No. 581, served March 25, 1966, Alexandria, Barcroft and Washington Transit Company was granted authority to extend its bus routes in Washington, D. C., to

the vicinity of 18th and L Streets, N. W. To establish such routes within the District of Columbia, authority is hereby granted to Alexandria, Barcroft and Washington Transit Company to operate in the following manner:

Over regular route to 14th Street and Pennsylvania Avenue, N. W., continue north on 14th Street, west on H Street, north on 17th Street, east on main roadway of K Street to 17th Street, continue on south service roadway of K Street to 16th Street, south on 16th Street, east on Eye Street, south on 14th Street to C Street, S. W., thence over regular route.

Over regular route to 12th Street and Pennsylvania Avenue, N. W., thence northwesterly on Pennsylvania Avenue, north on 14th Street, west on H Street, north on 17th Street, east on main roadway of K Street to 17th Street, continue on south service roadway of K Street to 16th Street, south on 16th Street, east on Eye Street, south on 14th Street to C Street, S. W., thence over regular route.

FOR THE COMMISSION

DELMER ISON
Executive Director

WASHINGTON METROPOLITAN AREA
TRANSIT COMMISSION

Route Authorization No. 1 – 66

IN THE MATTER OF: March 25, 1966

Establishment of Bus Routes for WMA Transit Company in Washington, D. C.

By Order No. 581, served March 25, 1966, WMA Transit Company was granted authority to extend its bus routes in Washington, D. C., to the vicinity of 18th and L Streets,

N. W. To establish such routes within the District of Columbia, authority is hereby granted to WMA Transit Company to operate in the following manner:

Over regular route to 11th Street and Pennsylvania Avenue, N. W., thence northwesterly on Pennsylvania Avenue, north on 14th Street, west on H Street, north on 17th Street, east on main roadway of K Street to 17th Street, continue on south service roadway of K Street to 16th Street, south on 16th Street, west on Eye Street, south on 14th Street, southeasterly on Pennsylvania Avenue to Third Street, N. W., thence over regular route.

Over regular route to 11th Street and New York Avenue, N. W., thence southwesterly on New York Avenue, west on H Street, north on 17th Street, east on main roadway of K Street to 17th Street, continue on south service roadway of K Street to 16th Street, south on 16th Street, east on Eye Street, south on 11th Street, thence east on Eye Street over regular route.

FOR THE COMMISSION

DELMER ISON
Executive Director

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 193

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION,

Petitioner,

v.

D. C. TRANSIT SYSTEM, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 193

WASHINGTON METROPOLITAN AREA
TRANSIT COMMISSION,

Petitioner,

v.

D. C. TRANSIT SYSTEM, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

The Washington Metropolitan Area Transit Commission ("Commission") has filed with this Court a Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit ("Petition") to review a final decision setting aside Commission Order No. 581 which directed Alexandria, Barcroft and Washington Transit Company, Inc. ("ABW") and W. M. A. Transit Company ("WMA") to extend certain of their routes into areas already being served by, and over routes already being operated by, Respondent, D. C. Transit System, Inc. ("Transit"), without having found that public convenience and necessity required such extensions or otherwise complying with Section 4(e), Article XII, Title II, of the Washington Metropolitan Area Transit Regulation Compact, Public Law 86-794, 74 Stat. 1031 (1960), 1 D.C. Code §§ 1410-16 (1961 ed.) ("Compact")[1] and without complying with the provisions of Transit's Congressional Franchise, Public Law 84-757, 70 Stat. 598 (1956) ("Franchise").

QUESTIONS PRESENTED FOR REVIEW

The questions to be reviewed by this Court, if a writ of certiorari is issued in this case, are as follows:

1. Whether the Court of Appeals for the District of Columbia Circuit (the "Court of Appeals") erred in its finding that the certificates of public convenience and necessity issued to ABW and WMA by the Commission ("grandfather certificates") pursuant to Section 4(a) of the Compact, which provides for the issuance of such certificates to any carrier "bona fide engaged in transportation . . . on the effective date of [the Compact] . . . without requiring further proof that public convenience and necessity will be served by such operation . . . : ", authorized ABW and WMA

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[1] Unless otherwise indicated, all citations to the Compact are to Article XII, Title II.

only to render such service as they were actually performing on the effective date of the Compact.

2. Whether the Court of Appeals, having found that ABW and WMA did not have the authority under their grandfather certificates to render any service not actually performed on the effective date of the Compact, erred in its finding that the Commission did not have the power to require such carriers to extend their service beyond that rendered on the effective date of the Compact without complying with Section 4(e) of the Compact, the source of the Commission's power to require the extension of such service.

STATEMENT OF THE CASE

On May 25, 1965, the Commission ordered a hearing upon the "propriety and reasonableness" of the extension of certain routes of ABW and WMA from their then terminals at 11th and 12th Streets and Pennsylvania Avenue, N.W., into areas already being served by, and over routes already being operated by, Transit ("Route Extensions").

By Order No. 581, served March 25, 1966 (Petition, pp. A9-A27), the Commission found that service by ABW and WMA over the Route Extensions would be in the public interest and authorized and directed ABW and WMA to extend their routes to render such service. In such order, the Commission held that the grandfather certificates issued to ABW and WMA by the Commission pursuant to Section 4(a) of the Compact authorized such carriers to go anywhere in the District of Columbia ("District") that the Commission thought desirable[2] and, therefore, the Commission determined that it was not required to comply with Section 4(e) of the Compact, the statutory authority for the Commission

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[2]The Commission's Staff witness testified that ABW and WMA have the authority under their grandfather certificates to provide service over every one of Transit's routes (R. 559).

"R." refers to the two-volume Joint Appendix in the Court of Appeals.

to require carriers to extend their services. Accordingly, the Commission (a) did not find that public convenience and necessity required the Route Extensions, (b) did not find that Transit's service over the routes and to the areas to be served by the Route Extensions was inadequate, and (c) did not afford Transit the opportunity to remedy any alleged inadequacy.

The Commission also found that it was not required to comply with Section 3 of Transit's Franchise,[3] which prohibited the establishment of service competitive to that of Transit unless such competitive service was necessary for the public convenience on the ground that the service to be rendered by ABW and WMA was interstate in nature and therefore not competitive with Transit's intra-District operations.

On May 18, 1966, Transit filed a Petition for Review of Commission Order No. 581 with the Court of Appeals asserting, among other things, that:

(1) The Commission erred in holding that the existing certificates of public convenience and necessity of ABW and WMA authorize them to serve the Route Extensions.

(2) The Commission erred in ordering ABW and WMA to serve the Route Extensions without amendment to their respective certificates of public convenience and necessity or the issuance of new certificates in accordance with all the provisions of Section 4(e) of the Compact.

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[3] Transit's rights under the Franchise were preserved by Section 3 of the Joint Resolution of Congress consenting to and approving the Compact, which provides in part:

> "That nothing in this Act or in the compact consented to and approved hereby shall impair or affect the rights, duties, and obligations created by the Act of July 24, 1956 (ch. 669, 70 Stat. 598), granting a franchise to D. C. Transit System, Inc." Public Law 86-794, 74 Stat. 1031, 1050 (1960), 1 D.C. Code § 1412 (1961 ed.).

(3) The Commission erred in ordering ABW and WMA to serve the Route Extensions without complying with Section 3 of Transit's Franchise.

(4) The Commission erred in issuing orders requiring ABW and WMA to serve the Route Extensions because such orders were not supported by substantial evidence in the record.

(5) The issuance of orders by the Commission requiring ABW and WMA to serve the Route Extensions and the procedures followed in connection therewith deprived Transit of its constitutional rights to substantive and procedural due process.

In a unanimous opinion filed March 7, 1967, the Court of Appeals set aside Commission Order No. 581 because the Commission had failed to act "in conformity with the statutory requirements and by reference to the statutory standards" (Petition, p. A8). In so doing, the Court of Appeals considered two separate issues and divided its opinion into two parts, each part considering and disposing of one of such issues.

In the first part of its opinion, the Court of Appeals considered whether or not ABW and WMA had the authority under their respective grandfather certificates to extend their service in the District beyond the terminals at 11th and 12th Streets and Pennsylvania Avenue, N.W. The Court of Appeals found that, on the effective date of the Compact, ABW and WMA furnished transportation from Virginia and Maryland, respectively, to such terminals in the District and no further. Accordingly, the Court of Appeals held that by statutory definition and on the basis of decisions of this Court and of its own decisions, the grandfather certificates could authorize no service in the District extending beyond such terminals and that the grandfather certificates did not purport to authorize service extending beyond such terminals (Petition, pp. A2-A4).

Having found that ABW and WMA did not have the authority under their respective grandfather certificates to

serve the Route Extensions, the Court of Appeals, in the second part of its opinion, considered whether or not the Commission had the power to require them to extend their services over the Route Extensions without complying with Section 4(e) of the Compact. The Court of Appeals found that the source of the Commission's power to require the extension of such service was set forth in Section 4(e) of the Compact and that service by ABW and WMA over the Route Extensions would be competitively adverse to Transit. On the basis of these findings, the Court of Appeals held that the Commission could not extend the routes of ABW and WMA in the District without complying with Section 4(e) of the Compact (Petition, pp. A4-A8).[4]

In so holding, the Court of Appeals rejected the contention of the Commission that it was not required to comply with Section 4(e) of the Compact because it had succeeded to the authority of the Interstate Commerce Commission ("ICC") and its other predecessor regulatory agencies, which, the Commission alleged, could have required ABW and WMA to extend their services without making the determinations required by Section 4(e). The Court of Appeals ruled that the authority which the predecessor regulatory agencies might have exercised prior to the Franchise and the Compact is not the measure of the Commission's present authority (Petition, pp. A5-A7).

On April 13, 1967, the Court of Appeals denied the Commission's petition for rehearing en banc.

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[4]The Court of Appeals stated that it did not need to decide whether Section 3 of Transit's Franchise provided Transit with any greater protection from competition than that contained in Section 4(e) of the Compact. The Court of Appeals noted that the Joint Resolution of Congress consenting to and approving the Compact specifically provided that nothing in the Compact would impair the rights of Transit under the Franchise. (Petition, p. A6, n. 5).

ARGUMENT

I

THE COMMISSION DOES NOT ESTABLISH ANY GROUNDS FOR THE ISSUANCE OF A WRIT OF CERTIORARI

The Commission has not shown in the Petition that any of the reasons which determine whether a writ of certiorari will be issued are present in this case. U.S. Sup. Ct. Rule 19, 28 U.S.C.

The Petition alleges, as reasons for this Court to issue a writ of certiorari in this case, (a) that the decision of the Court of Appeals violates basic principles of judicial review; (b) that the decision of the Court of Appeals is in conflict with applicable principles of law laid down by this Court and followed by the courts of appeals for other circuits; and (c) that there are "special and important reasons" warranting review of the decision of the Court of Appeals.

A.

The decision of the Court of Appeals is consistent with basic principles of judicial review

The Commission alleges that the Court of Appeals violates basic principles of judicial review because, in setting aside Commission Order No. 581, the Court of Appeals (1) does not state or show that the construction by the Commission of the grandfather certificates issued to ABW and WMA was arbitrary, capricious or clearly erroneous; (2) goes "behind" the language of the grandfather certificates issued to ABW and WMA in ruling upon their scope; and (3) makes findings contrary to the determination of the Commission, allegedly supported by substantial evidence in the record, that the Route Extensions would have no substantial adverse economic effect upon Transit. As hereinafter shown, the Commission fails to substantiate any of the above grounds it re-

lies on for its allegation that the Court of Appeals has violated basic principles of judicial review and, therefore, such allegation does not constitute a basis for the issuance of a writ of certiorari in this case.

1. The Court of Appeals finds that the construction by the Commission of the grandfather certificates was clearly erroneous

The Commission states that the Court of Appeals "neither stated that the Commission's ruling [in Order No. 581] was arbitrary, capricious, or clearly erroneous nor spelled out any theory why this might be the case" (Petition, p. 10). Accordingly, the Commission maintains that, in setting aside the Commission's interpretation in Order No. 581 of the grandfather certificates issued to ABW and WMA, the Court of Appeals has violated basic principles of judicial review.

Although the Court of Appeals may not have used the words "clearly erroneous" in its decision, the Court of Appeals does find that the Commission's interpretation of the grandfather certificates issued to ABW and WMA to authorize such carriers to serve the Route Extensions has no basis in fact or law for the following reasons:

(a) Section 4(a) of the Compact, the statutory authority for the issuance of the grandfather certificates to ABW and WMA, provides that grandfather certificates will be issued for transportation "bona fide engaged in" on the effective date of the Compact (Petition, p. A3).

(b) It is well established law that "bona fide" engagement in transportation for the purpose of "grandfather clauses" similar to Section 4(a) of the Compact requires proof of actual, and not potential, operations (Petition, p. A4, n. 2).

(c) There is no reason to suppose that Congress read the Compact language of "bona fide engaged in transportation . . . on the effective date of [the Compact]" in any manner contrary to the established law applicable thereto (Petition, p. A4, n. 2).

(d) Neither ABW nor WMA provided service over the Route Extensions or to the area served thereby on the effective date of the Compact (Petition, p. A4).

(e) The applications for grandfather certificates filed by ABW and WMA pursuant to Section 4(a) of the Compact were for certificates "authorizing continuance of operations being conducted on the effective date of the Compact" (Petition, p. A3; Ex. 88, R. 295).

(f) The Commission order issuing the grandfather certificates to ABW and WMA states that the only issue considered by the Commission was whether or not ABW and WMA were "bona fide engaged in transportation . . . for which authority was sought" on the effective date of the Compact (Petition, pp. A2-A4; Ex. 88, R. 296).

It is clear from the foregoing that the Court of Appeals found that the ruling of the Commission in Order No. 581 that the grandfather certificates issued to ABW and WMA authorized service over the Route Extensions was in error. The decision by the Court of Appeals to set aside such ruling of the Commission does not violate basic principles of judicial review. *Nelson, Inc. v. United States,* 355 U.S. 554 (1958).

2. The Court of Appeals does not ignore the plain language of the grandfather certificates

The Commission states "that the Court of Appeals erred in failing to follow the principles of judicial review. . . which require that the rights of the carrier be determined by the language of the certificate. . . ." (Petition, p. 12). The Commission maintains that the Commission's interpretation of the scope of the language of the grandfather certificates was rejected by the Court of Appeals on the "erroneous theory that the actual operations prior to issuance" of the grandfather certificates to ABW and WMA determined the scope of the authority granted (Petition, p. 16).

A careful review of the opinion of the Court of Appeals shows that there is no basis for the allegation by the Commission in the Petition that the Court of Appeals ignored and looked beyond the plain language of the grandfather certificates. The Court of Appeals merely holds that the interpretation by the Commission of the grandfather certificates issued to ABW and WMA to authorize service not actually performed on the effective date of the Compact is inconsistent with applicable law. Such holding is required by the decisions of this Court. *E.g., United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475 (1942). Such holding, therefore, does not violate basic principles of judicial review.

3. The decision of the Court of Appeals is consistent with basic principles of judicial review even if the Court of Appeals considers such circumstances surrounding the issuance of the grandfather certificates as were considered by the Commission

Assuming, *arguendo*, that the Court of Appeals had considered matters beyond the plain language of the grandfather certificates issued to ABW and WMA, the decision of the Court of Appeals would not violate basic principles of judicial review.

(a) The Commission found it necessary to consider matters beyond the plain language of the grandfather certificates

The Commission, in determining the scope of the operating authority granted by the grandfather certificates issued to ABW and WMA, found it "necessary to consider the circumstances surrounding their issuance" (Commission Order No. 581, Petition, pp. A12-A15).

The Commission, having considered matters beyond the plain language of the grandfather certificates issued to ABW and WMA in determining the scope of the operating authority granted thereby, cannot preclude the Court of Appeals from doing likewise. It is clear that there can be no meaningful review of the validity of the Commission's construction of the grandfather certificates unless the Court of

Appeals considers the bases for such construction. The Commission, having deemed it necessary to consider "the circumstances surrounding" the issuance of grandfather certificates, the Court of Appeals is required to consider and review such circumstances. *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

(b) Consideration by the Court of Appeals of the operating authority of ABW and WMA prior to issuance of grandfather certificates is not for the purpose of determining the scope of such authority

The findings of the Court of Appeals concerning the operating authority of ABW and WMA prior to the effective date of the Compact are not for the purpose of determining the scope of such authority but only for the purpose of determining the regulatory power and practice in designating routes and termini in the District then in effect (Petition, pp. A5-A7).

It was necessary for the Court of Appeals to consider the practice of the predecessor regulatory agencies because the Commission asserted that it had succeeded to their jurisdiction and could, therefore, treat ABW and WMA as having the authority to go anywhere in the District on the ground that their grandfather certificates paralleled the language of those carriers' prior ICC certificates and that the prior ICC certificates granted such broad authority (Petition, pp. A5-A7). The Court of Appeals rejects this assertion of the Commission and holds that regardless of the powers which the ICC had, the Commission's powers are limited to those granted by the Compact (Petition, pp. A6-A7).

In any event, the Commission's assertion that the ICC certificates authorized ABW and WMA to go anywhere in the District is in error. The Commission's claim that ICC certificates to serve "Washington, D.C." grant authority to serve any point or go over any route in the District has been rejected by the District Court for the District of Columbia and the Public Utilities Commission of the District

of Columbia ("PUC")[5] in determining issues identical to those raised by the Commission.[6] Clearly, under the regulatory practice in effect prior to the enactment of the Compact, ABW and WMA were subject to the authority and control of the PUC and a Joint Board made up of the PUC and the District Commissioners for the designation of street routings and termini.

(c) The Court of Appeals does not collaterally attack the grandfather certificates

A careful review of the opinion of the Court of Appeals shows that there is absolutely no basis for the further allegation by the Commission in the Petition that the decision of the Court constitutes a collateral attack upon the grandfather certificates.

The Court of Appeals does not review, or even consider, the validity of the grandfather certificates. The Court merely holds that the interpretation by the Commission of the grandfather certificates issued to ABW and WMA, subsequent to the issuance thereof, to authorize service not actually performed on the effective date of the Compact is inconsistent with applicable law (Petition, pp. A2-A4, A6-A8). This holding does not constitute a collateral attack upon the grandfather certificates.

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[5] Now the Public Service Commission of the District of Columbia.

[6] *Capital Transit Co. v. Riley E. Elgen,* Civil Action No. 971, D. D.C., January 19, 1939; *Oriole Motor Coach Co. v. Public Utils. Comm'n,* 111 F. Supp. 621 (D. D.C. 1953), *aff'g Oriole Motor Coach Lines, Inc.,* 95 P.U.R. (n.s.) 188 (D.C. Pub. Utils. Comm'n, 1952); District of Columbia Pub. Utils. Comm'n Order No. 3368, April 26, 1948. See also *Capital Transit Co. v. Safeway Trails, Inc.,* 201 F.2d 708, 709 (D.C. Cir. 1953).

4. The Court of Appeals correctly rejects the findings of the Commission that the Route Extensions would not have an adverse financial impact on Transit

The Commission states that the finding of the Court of Appeals that the Route Extensions will have a substantial financial impact on Transit is contrary to the Commission's determination which, the Commission alleges, is supported by substantial evidence in the record (Petition, pp. 16-18). Accordingly, the Commission maintains that the finding of the Court of Appeals is contrary to the principles of administrative law and violates the basic principles of judicial review.

The Commission's finding that the Route Extensions will not have a substantial economic effect upon Transit is directly contrary to the only evidence in the record before the Commission concerning the losses which Transit might sustain from the then existing joint fare arrangements (Ex. 33, R. 107; R. 554-55, 616-19, 621-22, 632, 635-36, 672-75). This evidence shows that the projected annual decrease in Transit's revenues resulting from service by ABW and WMA over the Route Extensions would amount to between $130,000 and $600,000.[7]

In any event, it is the fact of the potential loss of revenue and not the actual amount of the projected loss which is material to the finding by the Court of Appeals that the Route Extensions would have a financial impact upon and

[7]If all 1,413 ABW and WMA passengers who indicated in the Commission's survey that their destination was in the area of the Route Extensions (Petition, pp. A17 - A20) were to use the new service provided by ABW and WMA instead of transferring to Transit vehicles, the loss of revenue to Transit, based on the 17½¢ joint-fare in each direction, would be approximately $500 per working day, or $130,000 per year. The amount of $600,000 is based on the estimate by a Transit witness that 80 to 90 per cent of the passengers transferring to Transit from ABW and WMA have as their destination the area served by the Route Extensions.

be competitively adverse to Transit. *Oriole Motor Coach Co. v. Public Utils. Comm'n, supra; Capital Transit Co. v. Riley E. Elgen, supra.*

Thus, the Court of Appeals does not violate basic principles of judicial review in concluding that service by ABW and WMA over the Route Extensions would have a financial impact upon Transit which the Commission was required to consider under Section 4(e) of the Compact before directing ABW and WMA to serve the Route Extensions.

B.

The decision of the Court of Appeals does not create a conflict with decisions of this Court or of courts of appeals for other circuits

The Commission alleges that the decision of the Court of Appeals, in setting aside Commission Order No. 581, conflicts with applicable principles of law laid down by this Court and followed by other courts of appeals because the Court of Appeals (1) collaterally attacks the grandfather certificates issued to ABW and WMA by questioning their validity; and (2) considers matters beyond the plain language of such grandfather certificates in determining the scope of the authority granted thereby. As hereinafter shown, the Commission fails to substantiate any of the above grounds it relies on for its allegation that the decision of the Court of Appeals conflicts with decisions of this Court and of other courts of appeals and, therefore, such allegation does not constitute a basis for the issuance of a writ of certiorari in this case.

1. The decision of the Court of Appeals does not collaterally attack the grandfather certificates

As has been shown at page 11, *supra*, the Court of Appeals does not review, or even consider, the validity of the grandfather certificates issued to ABW and WMA. There is, therefore, absolutely no basis for the allegation by the Commission that the decision of the Court of Appeals constitutes

a collateral attack on such grandfather certificates. Accordingly, such decision does not conflict with the decisions in the cases cited in the Petition holding that the validity of grandfather certificates may only be questioned in the proceeding in which they were issued.

2. The decision of the Court of Appeals determining the scope of authority granted by the grandfather certificates does not improperly consider any matters beyond the plain language thereof

As has been shown at pages 8-9, *supra*, the Court of Appeals did not consider matters beyond the plain language of the grandfather certificates issued to ABW and WMA in determining the scope of the authority granted thereby.

Assuming, *arguendo*, that the Court of Appeals had considered matters beyond the plain language of the grandfather certificates issued to ABW and WMA, the decision of the Court of Appeals does not conflict with the policy established by this Court or with decisions of other courts of appeals. The Court of Appeals, if it considered such matters, was compelled to do so by the Commission because the Commission held in Order No. 581 that it was necessary for the Commission to "consider the circumstances surrounding" the issuance of the grandfather certificates to construe the authority granted to ABW and WMA. *SEC v. Chenery Corp., supra.* (See pp. 9-11, *supra*).

The decision of the Court of Appeals on the scope of authority granted by the grandfather certificates does not conflict with the decisions of this Court or of other courts of appeals cited by the Commission in the Petition. In none of the cases cited by the Commission as authority for its allegation that such conflict exists had the regulatory agency found it necessary to consider the circumstances surrounding the issuance of the certificate at issue.

There is, therefore, no basis for the allegation that in its decision the Court of Appeals improperly considers matters beyond the plain language of the grandfather certificates thereby creating a conflict with decisions of this Court or of other courts of appeals.

3. Even if there were a difference between the decision of the Court of Appeals and decisions of this Court or of courts of appeals for other circuits, there is no basis for the issuance of a writ of certiorari

Assuming, *arguendo*, that there were a difference between the decision of the Court of Appeals and those decisions holding that grandfather certificates must be construed by reference only to their plain language in proceedings other than those in which such certificates were issued, a writ of certiorari should not be issued in this case.

Mr. Justice Harlan has stated that:

> "[D]ifferences between the Courts of Appeals in two or more circuits will not be accepted as a conflict [to warrant review on writ of certiorari] if they can fairly be accounted for on the basis of variations in the factual situations among the cases involved."[8]

This case involves special facts applicable to it alone. The following factors, present in this case, were present in none of the cases upon which the Commission relies in order to establish a conflict:

> (1) This case involves the interpretation of the authority granted by an interstate compact to a regulatory agency which succeeded to the jurisdiction exercised by the ICC and three state regulatory agencies.
>
> (2) This case involves the interpretation of grandfather certificates issued under an interstate compact to perpetuate operations conducted pursuant to authority granted by the ICC and state regulatory agencies.

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[8] *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austl. L.J. 108, 111-112 (1959); *Manning the Dikes – Some Comments on the Statutory Certiorari Jurisdiction and Jurisdictional Statement Practice of the Supreme Court of the United States*, 13 Record of N.Y.C.B.A. 541, 552 (1958).

(3) This case involves a situation where the regulatory agency, in its own determination of the extent of the operating authority granted by its grandfather certificates issued to two carriers, itself found it "necessary to consider the circumstances surrounding their issuance" (Commission Order No. 581, Petition, p. A12).

These factors distinguish this case from the cases relied upon by the Commission to establish a conflict of decisions. If there were a difference between the decision of the Court of Appeals and this Court or other courts of appeals, such difference is due to the foregoing variations in the factual situation. According to Mr. Justice Harlan, this Court will not accept such difference as a conflict among courts of appeals and, therefore, a writ of certiorari should not be issued in this case.

C.

There are no special and important reasons warranting the issuance of a writ of certiorari

The Commission fails to sustain its allegation in the Petition that there are "special and important reasons" warranting the issuance of a writ of certiorari to the Court of Appeals in this case. Rule 19 of the Rules of this Court provides that writs of certiorari will be granted to review a decision of a court of appeals only where there are "special and important reasons therefor" and specifies what constitutes such reasons in paragraph 1(b) of the Rule. U.S. Sup. Ct. Rule 19, 28 U.S.C. Thus, to allege that "special and important reasons" warrant the issuance of a writ of certiorari is to allege that one or more of the reasons set forth in paragraph 1(b) of Rule 19 are present and no more.

As has been shown above, the decision of the Court of Appeals setting aside Commission Order No. 581 neither violates principles of judicial review nor does it conflict

with decisions of this Court or of other courts of appeals (See pp. 6-16, *supra*). The Commission does not allege that any of the other reasons characterized by this Court as being "special and important" in Rule 19 are present in this case. The attempt by the Commission to put the onus on this Court for any inconvenience to the public which may arise from the refusal to issue a writ of certiorari in this case does not provide a reason or basis for the issuance of the writ.

The refusal by this Court to issue a writ of certiorari in this case does not mean that, under the decision of the Court of Appeals, the Commission may not require ABW and WMA to serve the Route Extensions. There are several alternative courses of conduct available to the Commission herein. One alternative would be for the Commission merely to make the additional findings required by, and to comply with, Section 4(e) of the Compact. Or, alternatively, as the Record herein shows, the Commission could permit Transit to work out arrangements to provide such service as may be required (R. 638-45).

II

THE FINDING BY THE COURT OF APPEALS THAT THE COMMISSION FAILED TO ACT IN CONFORMITY WITH STATUTORY STANDARDS IS CORRECT

The Court of Appeals sets aside Commission Order No. 581 because the action of the Commission requiring ABW and WMA to serve the Route Extensions was not "taken in conformity with the statutory requirements and by reference to the statutory standards" (Petition, p. A8).

The Court of Appeals is correct in holding that the operating authority granted to ABW and WMA by the grandfather certificates is defined by Section 4(a) of the Compact pursuant to which such certificates were issued and that grandfather certificates are issued to permit only the continua-

tion of actual, and not potential, operations.[9] The Court properly finds that neither ABW nor WMA provided service over the Route Extensions on the effective date of the Compact. There is absolutely no authority for the Commission's allegations in the Petition that it is potential or authorized operations, and not actual service, which are the determinative factors in setting the scope of authority preserved by grandfather certificates.

The Court of Appeals is also correct in finding that the Commission, in issuing the grandfather certificates to ABW and WMA, did not purport to grant authority for any operations not actually conducted on the effective date of the Compact. In their applications for grandfather certificates, ABW and WMA sought certificates authorizing only "continuance of operations being conducted on the effective date of the Compact" (Ex. 88, R. 295). In the order issuing these grandfather certificates, the Commission defined the matters it considered with respect to such issuance as follows:

> "The only issues involved were whether or not the applications were timely filed and whether or not the applicants were *bona fide engaged* in transportation subject to this Act for which authority was sought." (emphasis added) (Ex. 88, R. 296).

Clearly, neither ABW nor WMA sought authority for operations not actually conducted on the effective date of the Compact and, in issuing the grandfather certificates, the Commission did not purport to grant any greater authority.

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[9] *United States v. Carolina Freight Carriers Corp., supra,* 315 U.S. at 480-81; *McDonald v. Thompson,* 305 U.S. 263, 266 (1938); *Holiday Tours, Inc. v. Washington Metropolitan Area Transit Comm'n,* 352 F.2d 672, 676 n. 5 (D.C. Cir. 1965); *Gadd v. Washington Metropolitan Area Transit Comm'n,* 347 F.2d 791, 792 n. 1 (D.C. Cir. 1965) (per curiam); *Crescent Express Lines, Inc. v. United States,* 49 F. Supp. 92, 94 (S.D. N.Y. 1943), *aff'd* 320 U.S. 401 (1943); *Moore v. United States,* 41 F. Supp. 786, 791 (D. Minn. 1941) (per curiam), *aff'd mem.,* 316 U.S. 642 (1942).

The Court of Appeals is also correct in finding that service by ABW and WMA over the Route Extensions would have an adverse financial impact upon Transit and that, consequently, Transit is entitled to the protection provided by Section 4(e) of the Compact (See pp. 12-13, *supra*).

Having found that the grandfather certificates do not authorize service by ABW and WMA over the Route Extensions and that such service would be competitively adverse to Transit, the Court of Appeals is correct in holding that the Commission was required to comply with Section 4(e) of the Compact in ordering ABW and WMA to serve the Route Extensions.

The Commission did argue that it need not comply with Section 4(e) of the Compact because its predecessor regulatory agencies, the ICC and the PUC, or the Joint Board, could have required ABW and WMA to serve the Route Extensions without making any findings of public convenience and necessity[10] (Commission Order No. 581, Petition, pp. A14-A17). In the first place, the Commission is wrong in that it could not require ABW and WMA to extend their service and serve the Route Extensions without complying with Section 4(e) of the Compact and Section 3 of the Franchise. Moreover, the Court of Appeals is correct in rejecting the Commission's argument and holding that regardless of the powers which the predecessor agencies had, the Commission's powers are limited to those granted by the Compact and the Franchise.

The decision by the Court of Appeals that the Commission failed to act in conformity with statutory requirements and standards in ordering ABW and WMA to serve the Route Extensions is clearly correct and supported by substantial

[10]The predecessor agencies did not, in fact, have such authority. *Oriole Motor Coach Co. v. Public Utils. Comm'n, supra; Capital Transit Co. v. Riley E. Elgen, supra;* District of Columbia Pub. Utils. Comm'n Order No. 3682, June 14, 1950 (Ex. 87, R. 264); District of Columbia Pub. Utils. Comm'n Order No. 3368, *supra.* See also *Capital Transit Co. v. Safeway Trails, Inc., supra.*

authority. There is, therefore, no reason for this Court to issue a writ of certiorari in this case to review the decision of the Court of Appeals.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit in this case should be denied.

Respectfully submitted,

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